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Supreme Court, U.S.
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In the

# Supreme Court of the United States
## October Term, 2003

JOHN O'HARA,

*Petitioner-Appellant,*

-against-

THE PEOPLE OF THE STATE OF NEW YORK,
HONORABLE CHARLES HYNES,
DISTRICT ATTORNEY KINGS COUNTY,

*Respondents-Appellees.*

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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48 pp

## QUESTIONS PRESENTED

1. Whether failing to raise on appeal, the failure of trial counsel to object to a charge that was obviously unconstitutional regarding the definition of residence in the context of a criminal election law case, constitutes ineffective assistance of appellate counsel.

2. Whether trial counsel was ineffective for failing to object to the language of the charge concerning the definition of residence on the ground that as given it was unconstitutional.

## PARTIES TO THE PROCEEDING

The parties to the proceeding are those named in the caption.

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Petitioner respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit in this case.

## *CITATION TO OPINION BELOW*

The Court of Appeals order appears in the Appendix hereto (App. A).

## STATEMENT OF JURISDICTION

The Court of Appeals entered its order on August 26, 2003.

## STATUTORY PROVISIONS INVOLVED

The provision of New York Election Law 1-104(22) relevant to this petition is reprinted in the Appendix at 2a.

## STATEMENT OF THE CASE

1. Petitioner, was an attorney, who had run for state and local elective offices, and registered and voted in five separate elections over the course of one year from 553 47th Street in Brooklyn, New York. In their prosecution of petitioner, the respondents contended that the 47th Street address was not his principal address, but rather was in an apartment at 579 61st Street in Brooklyn. At trial, the petitioner maintained, however, that he had two bona fide residences, one on 61st Street and the other on 47th Street, either of which could lawfully be selected by him as a voting address.

2. He was charged, under Indictment Number 13525/96, with one count of Offering a False Instrument For

Filing in the First Degree (New York P.L. §175.35), one count of False Registration (New York Election Law §17-104[4]), and five counts of Illegal Voting (New York Election Law §17-132[3]).

3. Petitioner was tried three times on these charges. At the first trial, petitioner was convicted on all counts but his conviction was reversed on appeal on the ground that the trial court had erred by giving an erroneous missing witness charge. *People v. O'Hara*, 253 A.D.2d 560 (2nd Dept. 1998). His second trial ended in a mistrial (Gerges, J.). His third trial resulted in his conviction on all counts. Petitioner was then sentenced to a three-year period of conditional discharge, 1,500 hours of community service, which he is currently serving, restitution of $9,192, and a fine of $6,000. The court also imposed a $5,000 civil penalty, payable to the New York City Campaign Finance Board (Gerges, J., at trial and sentence). This penalty was later vacated by the trial court.

4. This judgment was affirmed on direct appeal to the Appellate Division, Second Department, and on appeal by permission to the New York Court of Appeals. *People v. O'Hara,* 274 A.D.2d 486 (2nd Dept. 2002), *aff'd*, 96 N.Y.2d 378 (2001)(5-2 decision).

5. Petitioner was the only person ever convicted for the failure to establish legal residence inside a voting district and only the second person to be criminally prosecuted for this failure. *People v. O'Hara,* 96 N.Y.2d at 390, fn.3 (2001).

6. On November 7, 2001, petitioner moved to vacate the judgment of conviction pursuant to New York Criminal Procedure Law §440.10, claiming that he was denied the effective assistance of trial counsel. Specifically, petitioner argued that his trial counsel's failure to object to the language of the charge concerning the definition of residence on the

ground that as given it was unconstitutional, denied him his rights to due process and effective assistance of counsel.

7. In its decision, the trial court held that the New York Court of Appeals in its opinion considered the constitutional arguments raised in the motion:

> Since the Court of Appeals has ruled that the instant charge was valid under the laws of New York and the cases cited by defendant establish that New York Law complies with constitutional dictates (*Williams v. Salerno*, 792 F.2d 323, *Auerbach v. Rettaliata*, 765 F.2d 350) the court's charge must have complied with constitutional dictates.
>
> Thus, there was no legal basis for defense counsel to object to the court's charge as a violation of the defendant's constitutional rights.

8. Contrary to the trial court's opinion, however, the Court of Appeals never addressed the constitutional issue raised. It held that it was without the power to address the constitutional issue:

> Defendant now argues that the Election Law definition of "residence" cannot be applied literally in a case of dual residency and that a literal application of Election Law §1-104(22) is unconstitutional. Defendant further maintains that the indictment should be dismissed because the Election Law

> definition of "residence" is vague. *However, during the jury charge conference, defendant did not object to the specific language of the charge, nor did he raise any of the constitutional issues he now asserts. Thus, those issues are unpreserved* (*see, People v. Cadorette*, 56 N.Y.2d 1007, 1009; *People v. Whalen*, 59 N.Y.2d 273, 279-280). (See, p. 12 of the opinion.) (Emphasis added).

*People v. O'Hara*, 96 N.Y.2d at 383-4.

9. On July 10, 2002, the Appellate Division, Second Department denied leave to appeal. *People v. O'Hara*, ___ A.D.2d ___ (2nd Dept. 2002).

10. In addition, on April 11, 2002, petitioner also moved for a writ of *error coram nobis* in the Appellate Division, Second Department. Specifically, petitioner argued that his appellate counsel was ineffective for failing to raise the argument that his trial counsel was ineffective for not objecting to the trial court's charge on the definition of a voting residence as unconstitutional. In addition, petitioner argued that this appellate counsel could have raised this issue in the interests of justice. Petitioner's motion was denied on September 23, 2002. *People v. O'Hara*, ___ A.D.2d ___ (2nd Dept. 2002).

11. O'Hara filed his petition for habeas corpus in the district court for the Eastern District of New York on October 8, 2002 asserting that the judgment of conviction should be vacated on the ground that petitioner was denied effective assistance of trial and appellate counsel in violation of his Sixth Amendment right by [1] his trial counsel's failure to object to the language of the charge concerning the definition of residence on the ground that as given it was unconstitutional

and [2] his appellate counsel's failure to raise the issue that his trial counsel was ineffective for not objecting to the trial court's charge concerning the definition of residence on the ground that as given it was unconstitutional.

12. In an oral opinion delivered on March 7, 2003 and in a subsequent order the district court rejected O'Hara's claims and denied a certificate of appealability.

13. On August 26, 2003, the United States Court of Appeals for the Second Circuit denied a certificate of appealability.

14. O'Hara did not dispute at trial that he in fact registered to vote using the 47th Street address and that he voted from the address five separate elections - - a general election on November 3, 1992, a school board election on May 4, 1993, a primary on September 14, 1993; a special election on September 28, 1993, and a general election on November 2, 1993 (T. 43, 49-51, 360-62).[1] The sole contested issue was whether O'Hara's residence at the 47th Street address was his principal address; the People arguing that "there is no question that he lives on 61st Street" (T.451). The People further recognized the issue of residence related to the legal instructions: "The Judge is going to charge you on the law as to what a residence is" (T.448).

15. As Judges Rosenblatt and Levine stated in their dissenting opinions:

> "A voter cannot have two "fixed, permanent and principal homes." "Principal" is defined as "first, highest, or foremost in importance, rank, worth,

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[1]Numbers preceded by "T." refer to the transcript of trial minutes.

> or degree, chief" (*see*, American Heritage College Dictionary, at 1088 {3d Ed}). It is not possible to have two living quarters both of which are "first, highest or foremost in importance."

*People v. O'Hara*, at 389.

16. During the charge conference, the trial court indicated that it would define residency to the jury as follows:

> "According to the law a residence is that place where a person maintains a fixed, permanent principal home and to which he wherever temporarily located always intends to return.
>
> "Additionally, a candidate who has two residences may choose one to which he has the legitimate, significant and continuing attachment as his residence for purpose of the [E]lection [L]aw. It is for the candidate to decide which address is to be his voting and campaign address.
>
> "However, the address chosen by the defendant as his residence must comport with the definition of residence as I have previously given it to you." (T. 487-88)

17. The first of the charge is a verbatim reading of Election Law §1-104(22), which defines "residence" as "that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return." The Second part of the charge was the trial court's attempt to incorporate the Court of Appeals

formulation for residence under the Election Law. In *Matter of Ferguson v. McNab*, 60 N.Y.S.2d 192, 454 N.E.2d 532 (1983), the Court of Appeals stated:

> Respondent candidate having two residences may choose one to which she has legitimate, significant and continuing attachments as her residence for purposes of the Election Law.

Id., 60 N.Y.2d at 600. The third portion of the charge effectively expunged the *Ferguson v. McNab* formulation and emphasized to the jury that all the criteria set forth in the Election Law §1-104(22) had to be present for an address to be deemed a valid voting address.

18. Defense counsel objected to the charge solely on the ground that it was confusing. As found by the Court of Appeals, he effectively agreed with the court's use of the definitions of "residence" found in Election Law §1-104(22) and the language the court utilized in attempting to incorporate the principles on *Ferguson v. McNab*:

> As defense counsel noted, "I don't have a problem with that definition of residency [the charge language involving multiple residences] being attached to the first definition of residency [the charge language taken directly from Election Law §1-104(22)]." Defense counsel limited his objection "strictly to the fact that after these two portions of residency are read, the Court refers the jurors back to Election Law Section 1-104, sub. 22."

*People v. O'Hara*, 96 N.Y.2d at 381.

19. The objection was overruled, the instruction was read to the jury as initially proposed. The defendant was convicted on all counts.

## REASONS FOR GRANTING THE WRIT

### 1. The Petition Should be Granted Because the Charge as Given Which Incorporate a Literal Application of New York Election Law §1-104(22) was Unconstitutional.

Petitioner was denied effective assistance of appellate counsel in violation of this Sixth Amendment right by his appellate counsel's failure to raise the issue that his trial counsel was ineffective for not objecting to the trial court's charge concerning the definition of residence on the ground that as given it was unconstitutional. The court's charge on "residence," was the crucial instrument from which the jury decided the charges filed against petitioner. As judge Rosenblatt wrote in his dissenting opinion in *People v. O'Hara,* 96 N.Y.2d 378, 386 (2002):

> "Because defendant acknowledged that he had listed the 47th Street apartment as his residence, the only fact issue at trial was whether that apartment was his 'residence' within the meaning of the Election Law."

Trial counsel never objected to the charge on a constitutional basis and appellate counsel never raised an

argument concerning the absence of trial counsel's objection, or raised the issue in the interests of justice.[2] Prior cases in this district and in the Northern District of New York, have found that a literal application of Election Law §1-104(22) is unconstitutional.

The right to vote is unquestionably a fundamental right. As stated by the Supreme Court in *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964):

> No right is more precious in a free country than that a having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Accordingly, where a statute places restrictions on a person's right to vote, the statute is subject to strict constitutional scrutiny. *Carrington v. Rash*, 380 U.S. 89 (1965); *Harper v. Board of Elections*, 383 U.S. 663 (1966), *Kramer v.*

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[2] A defense counsel's ineffectiveness in failing to properly preserve a claim for review in state court can suffice to establish cause for a procedural default only when the counsel's ineptitude rises to the level of a violation of a defendant's Sixth Amendment right to counsel. *Edwards v. Carpenter, 529 U.S. 446, 451 (2000); Murray, 477 U.S. at 488-89.* "In other words, ineffective assistance adequate to establish cause for the procedural default of some *other* constitutional claim is *itself* an independent constitutional claim. *"Edwards, 529 U.S. at 451.*

*Union Free School District No. 15*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 709 (1969); *Evans v. Cornman,* 398 U.S. 419 (1970); *Phoeniz v. Kolodziejski,* 399 U.S. 204 (1970). In addition, the Equal Protection Clause of the Fourteenth Amendment guarantees that individuals similarly situated will be dealt with in a similar manner by government. *Auerbach v. Kinley,* 594 F.Supp. 1503, 1507 (E.D.N.Y. 1984). If a state enacts a statute restricting the rights of some but not others in the exercise of a fundamental right, the statute is subject to strict constitutional scrutiny. *Dunn v. Blumstein,* 405 U.S. 330, 336-337 (1972). To survive strict constitutional scrutiny, the restriction imposed by such a statute must advance a compelling governmental interest by the least drastic means. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 336-337 (1972).

In *Dunn v. Blumstein,* 405 U.S. at 336-37, where the Supreme Court made it unquestionably clear that all substantial restrictions upon the right to vote, including the imposition of "residence requirements", must be closely scrutinized in constitutional terms:

> In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. See, e.g., *Evans v. Cornman,* 398 U.S. 419, 421-22, 426 (1970); *Kramer v. Union Free School District No. 15,* 395 U.S. 621 (1969); *Cipriano v. City of Houma,* 395 U.S. 709 (1969); *Harper v. Board of Elections,* 383 U.S. 663 (1966), *Carrington v. Rash*, 380 U.S. 89 (1965); *Reynolds v. Sims, supra.* This

> 'equal right to vote', *Evans v. Cornman, supra,* 398 U.S. at 426, is not absolute, the States have the power to impose qualifications, and to regulate access to the franchises in other ways. See, e.g., *Carrington v. Rash, supra,* 380 U.S. at 91, *Oregan v. Mitchell,* 400 U.S. 112, 114 (opinion of Justice Douglas), 241 (opinion of Justice Brennan, White and Marshall), 294 (opinion of Justice Stewart, in which Chief Justice Berger and Justice Blackmun joined). But as a general matter, 'before the right [to vote] can be restricted, the purpose of the restriction and that assertedly overriding interests served by it must meet close constitutional scrutiny.' *Evans v. Cornman,* 398 U.S. 419, 422 (1970); see *Bullock v. Carter,* 405 U.S. 134 at 143 (1972).

Election Law §1-104(22), the conerstone of the court's charge on residence, clearly places restrictions on a person's right to vote. Because the statute requires a voting address be a "permanent" home and the place to which a person "always intends to return", persons living in a community in non-permanent homes are effectively disenfranchised. Prior case law makes clear these restrictions render the Court's charge as given unconstitutional.

In *Ramey v. Rockefeller,* 348 F.Supp. 780 (E.D.N.Y.1972), a case that addressed the rights of college students to vote from their dormitory rooms, one of the issues presented was whether a state could require a voting address to be a "permanent" home. In concluding that such a requirement

was unconstitutional, Justice Friendly, writing for a three-member majority district court, wrote:

> "[W]e think the only constitutionally permissible test is the one which focuses on the individual's present intention and does not require him to pledge allegiance for an indefinite future...
> We think therefore that, in determining bona fide residence for a person physically present, the state cannot constitutionally go further that the test set out in the Restatement (Second) of the Conflict of Laws §18 (1971), namely, that he "**must intend to make that place his home for the time at least.**" (emphasis added.)

The same issue was addressed in *Auerbach v. Kinley,* 594 F.Supp. 1503, 1507 (N.D.N.Y. 1984), another case involving the rights of college students to vote from their dormitory rooms. In that case, the plaintiff maintained by requiring a voting address to be a "permanent" home to which the voter "always intends to return," Election Law §1-104(22) unduly abridged one's right to vote. Relying on *Ramey v. Rockefeller, supra.,* the Court stated:

> The word "permanent" as used in the statute is not meant to be taken literally, but rather, is intended to approximate the rest for domicile, i.e., physical presence and an intention to remain for the time at least. In discussing this point

> New York Jurisprudence states: "To satisfy constitutional requirements... the test of a student's intention to remain in a college community must focus on his present intention; he is not required to pledge that he will remain permanently or indefinitely. 18 N.Y. Jur., Elections @ 145 at 195 (1979).

*Id.* at 1507, n.5

The United States Court of Appeals affirmed stating:

> The District Court correctly noted that, as a matter of state law, this definition - particularly the requirement that the home be "permanent" -- should not be read literally but rather "is intended to approximate the test for domicile, i.e., physical presence and an intention to remain for the time at least."

*Auerbach v. Rettaliata*, 765 F.2d 350, 351 (2nd Cir. 1985) (citations omitted).

Finally, in *Levy v. Scranton,* 780 F.Supp. 897 (N.D.N.Y. 1991), the constitutionality of Election Law §1-104(22) was again questioned. That case also involved the rights of college students to vote from their dormitory rooms. Realizing that a literal application of Election Law §1-104(22) would "make it impossible for a dormitory room that must be vacated at the end of each academic year to meet the requirement for permanency", the court observed:

> Several courts in this circuit, and the Court of Appeals itself, have recognized that such a **literal reading of this**

> **definition would be an unfair and unconstitutional interpretation of the word "residency."** Therefore, these courts have given section 1-104(22) a much broader construction enabling them to save statute from constitutional invalidity.

*780* F.Supp. at 902 (emphasis added).

*Levy, Ramey* and *Auerbach* all make clear that a literal application of Election Law §1-104(22) is both unfair and unconstitutional. A State simply cannot require a voting address to be a permanent home. These cases also make clear that a State can go no further than to require a voting address to be a place where a person physically lives and intends to remain for at least the time being. It is this standard for "residence" that should have determined defendant's guilt or innocence, not the unconstitutional standard set forth in Election Law §1-104(22).

The prejudice to petitioner by counsel's failure to object to the charge on a constitutional basis is obvious and the failure of appellate counsel to raise the issue on appeal.[3] The only issue

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[3] Judge Rosenblatt also noted that this prosecution involved politics:

> If politically-charged disputes such as this and questions of "residence" are going to be resolved in the criminal arena and decided by juries, with the possibility of criminal conviction and incarceration, we would ensure that the definition of residence is plainly fixed and easily understood.

at trial for the jury to decide was whether the apartment on 47th Street was a valid "residence" within the meaning of the Election Law.[4] The Court's charge, however, on a

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*People v. O'Hara*, 96 N.Y.2d at 390.

[4] Petitioner testified that he moved to the 47th Street apartment in 1993 with the "intent to set up residency" there. He further testified that he moved his clothes and lamps to that apartment, where he initially stayed overnight "all the time" until construction work on the building began, after which he "stayed there a lot." *People v. O'Hara* 96 N.Y.2d at 390.

As Judge Rosenblatt stated in his dissenting opinion:

> "[w]e cannot agree that the jury must have credited the testimony that contradicted defendant's position that he resided at the 47th Street apartment. It is impossible to tell what testimony the jury actually credited because the erroneous charge would have allowed the jury to return a guilty verdict if it fully credited defendant's testimony."
>
> The possibility that the jury convicted the defendant because they believed that the 47th Street Address was not his permanent home and that place to which he always intended to return is the "unreliable result" talked about in

constitutional basis, did not correctly reflect the State of New York Election Law. Indeed, as given it was unconstitutional, see, *Levy, Ramey,* and *Auerbach*. Appellate counsel should have raised this issue.

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*Lockhart v. Fretwell*, 506 U.S. 364, 369-370, 113 S.Ct. 838, 122 L.Ed.2d 180, 96 N.Y.2d at 390.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A- The Order of the Second Circuit Court of Appeals denying a Certificate of Appealability dated August 26, 2003

United States Court of Appeals
For The Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 26th day of August two thousand and three,

Present:

Hon. Ralph K. Winter,
Hon. Guido Calabresi,
Hon. Robert A. Katzmann,
*Circuit Judges.*

John O'Hara,

Petitioner-Appellant,

v.

People of the State of New York,

Respondent-Appellee.

Appellant, through counsel, moves for a certificate of appealability. Upon due consideration, it is ORDERED that the motion for a certificate of appealability is denied and the appeal is dismissed because appellant has not made a "substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c).

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: s/

# Appendix B - The Oral Opinion of the District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x CV 02-5415

O'HARA,

Plaintiff,

1.

PEOPLE OF THE STATE OF NEW YORK,

Defendant.

----------x

United States Courthouse,
Brooklyn, New York

March 7, 2003
11:30 o'clock a.m.

TRANSCRIPT OF MOTION
BEFORE THE HONORABLE JOHN GLEESON
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Plaintiff: BARRY FALLICK, ESQ.

For the Defendant: MONIQUE FERRELL, ADA.

Court Reporter: Anthony M. Mancuso
225 Cadman Plaza East
Brooklyn, New York 11201
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Proceedings recorded by mechanical stenography, transcript produced by CAT.

(Case called; both sides ready.)

THE COURT: Good morning.
Do you want to be heard?

MR. FALLICK: Your Honor, we have raised, in our petition and our memorandum of law and our reply memorandum of law, an issue concerning the petitioner John O'Hara was denied the effective assistance of appellate counsel, for the failure of appellate counsel to raise issues concerning the constitutionality of the charges given concerning residence, and whether or not he should have raised the issue concerning trial counsel's failure to object to the based on those same grounds.

THE COURT: What exactly is the constitutional claim?

MR. FALLICK: Excuse me, your Honor?

THE COURT: What should trial counsel and appellate counsel have said about this charge? What's the federal constitutional argument?

MR. FALLICK: The federal constitutional argument is that the Supreme Court has obviously said the right to vote is one of our most cherished rights, and any restriction on the right to vote has been closely scrutinized.

In a series of federal cases, Second Circuit case and other cases from the District Courts, those courts have all said that a literal application of the election-law definition does not pass constitutional muster. I mean, Judge Friendly, in his opinion in the Ramy (ph.) case, said that the constitutionally permissible test is one that says that, under the statue, that a

residence is where one intends to make this place his home for a given period of time. That's not what his charge says.

The problem with this charge, and why it's not constitutional, you have the first paragraph, which gives the exact election-law definition. Then you have the second paragraph, which incorporates what I will say is this less-literal application of the residency law.

THE COURT: You mean Ferguson vs. McNabb?

MR. FALLICK: Right. Ferguson vs. McNabb. Also, what the Second Circuit in the District Court cases have said should be the test, and had the Court stopped there, and had the Court stopped there, I wouldn't be standing up here today.

The problem with the charge is, when you get to the third paragraph, where the Court --

THE COURT: The "However" part?

MR. FALLICK: Where the Court then says, in charging the jury: "However," and then it goes on.

Once the Court says "However," what it really is doing is, eliminating the test in the second paragraph, leaving the jury to only find that the 47th Street residence had to be Mr. O'Hara's permanent and fixed and principal place of residence.

THE COURT: See, I don't get that at all. That's where you lose me. It's one of the places you lose me.

MR. FALLICK: That's why you're sitting there and I'm here.

THE COURT: No. I read this as saying the residence

has to be a fixed, permanent and fixable home to which you intend to return when you're gone temporarily. Then, because of this Ferguson vs. McNabb, it says some people can have two residences, and if they do, they can pick one, as long as the one they pick is really a residence; that is, as long as it comports with the definition of "residence" as I've previously given you, which means it's a permanent and principal home, which means it can't be a sham. And the whole theory of this case was this other residence that he picked was a sham.

MR. FALLICK: I understand that is your Honor's concern.

I read the third paragraph. I can't tell you what the sense of the Court of Appeals is. However, the address chosen by the defendant, whether it's 61st Street or 47th Street as his residence, must comport with the definition of "residence" as I have previously given it to you.

I read that as going back to that definition in the first paragraph, because the Court is saying, according to the law, a residence is, and that's the definition. And that, in my opinion, eliminates what we are calling the Ferguson v. McNabb less-literal definition in the second paragraph.

THE COURT: I didn't mean to do this deliberately. Let me point out that we're kind of back into the argument that was made in all three trials, the state-law claim, the confusing-instruction argument. But that's not the argument. That's not the federal constitutional argument.

MR. FALLICK: That's correct.

The federal constitutional argument comes from, obviously, first, the right to vote. But the Second Circuit cases, the Second Circuit and all of the other District Court cases, say

that the constitutionally permissible test is one that focuses on the individual's present intention. That may have been fine if the Court, I submit, has stopped after the second paragraph of its charge. When it went to the third paragraph, it is really talking about, then, the first paragraph.

I understand it's confusing, but also constitutionally impermissible.

THE COURT: What happened in the second trial? Was it a hung jury?

MR. FALLICK: Yes, sir.

THE COURT: Your adversary claims that there's a procedural bar to the ineffective assistance of trial counsel claim.

MR. FALLICK: That's correct.

THE COURT: As I understand it, there's no dispute that the ineffective assistance of appellate counsel claim is exhaused, can and should be resolved by me on the merits, because there was a coram nobis petition?

MS. FERRELL: Yes.

THE COURT: What's your answer? I didn't see an answer. I might have missed it in the reply to the claim that there's a procedural default that poses yet another impediment to your habeas petition on trial counsel claim.

MR. FALLICK: You didn't miss it. I didn't address it.

THE COURT: Would you care to now?

MR. FALLICK: I didn't drift. I didn't want to abandon it. I certainly believe that it was not fully exhausted, and that the issue that this Court has to decide is whether or not appellate counsel was ineffective on the Strickland standard.

THE COURT: I'm not sure I agree with him on "procedural bar" or with you.

MR. FALLICK: I withdraw that.

THE COURT: We'll get to that in a minute. I'm not sure I agree with you, because it says "Procedural bar" - - I'll question your adversary about that.

Anything else you want to say in support of the petition?

MR. FALLICK: No, your Honor.

Yes, I do. I just want to get back to the most recent Second Circuit case, Whitman vs. Berman - -

THE COURT: Before you do, when did he run for office? I couldn't tell, from this, when he was a candidate, when he was just voting.

MR. FALLICK: I don't think I know the answer to that off the top of my head.

THE COURT: Is that in the record somewhere?

MS. FERRELL: His candidacy was never an issue at the trial. The only thing at issue at the trial was the voting, your

Honor.

THE COURT: Okay. Go ahead.

MR. FALLICK: Whitman vs. Berman, which is the last Second Circuit case that talks about the definition of -- under the election law, it cites O'Hara, and favorably cites O'Hara.

What the Court says is that -- I'm going to read this -- that New York courts have really -- New York State Courts have really developed a pragmatic approach when someone has two residences, in terms of where they can vote. It cites O'Hara with this quote: "An individual having two residences may choose one of which he has a legitimate, significant and continuing assessment as her residence for purposes of election law." Citing Ferguson against McNabb.

That is less that the literal definition on the election law. What the Court has always said should be the definition.

My argument -- I'm repeating myself -- is that after the second paragraph, which, in essence, gave that charge, the Court then gave that third paragraph, which I suggest to the Court eliminated what the Court in Whitman vs. Berman is saying should have been given.

THE COURT: Tell me precisely how, at trial, this prejudiced Mr. O'Hara.

MR. FALLICK: The sole issue at trial was whether the 47th Street residence was --

THE COURT: Was a sham or a real residence.

MR. FALLICK: Was a residence within the meaning of the election law. That's the sole issue at trial.

THE COURT: As the case was presented, the theory of the case wasn't he lives in both places, one place part of the time, one place more often, as I understood it. I read what you submitted. The prosecution's theory was, he never lived in this place, got his mail at the 61st Street address?

MS. FERRELL: Yes.

MR. FALLICK: Yes.

THE COURT: Had the telephone there. These guys who rented it from his ex-girlfriend or bought it from his ex-girlfriend, said he never lived there. I realize you had a different theory in the defense. I understood the prosecution theory to be this is just a sham. This is, plain and simple, not a residence at all under any definition under New York law.

MR. FALLICK: That was the People's argument, not Mr. O'Hara's argument. Mr. O'Hara's argument was that he lived at the 47th Street address, that he received his American Express bill there, that he received his registration from the Office of Court Administration, and that he even testified that when he went there he lived there. And Judge Rosenblatt, in his dissenting opinion, talks about Mr. O'Hara's testimony, that petitioner has testified that he moved to 47th Street in 1993 with the intent to set up residency and he moved clothes and lamps there, etcetera, etcetera.

So, the issue at trial is whether the 47th Street apartment was his residence within the meaning of the election law. That being the issue, the charge to the jury was most important; in fact, it was the only important issue, was the definition of residence.

THE COURT: Okay.
Thank you, sir.

MR. FALLICK: Thank you, your Honor.

THE COURT: Why is this procedurally defaulted when the, as I understand it, procedural bar that you rely upon was imposed, because the 440 Court thought this has already been resolved on the merits on the direct appeal?

MS. FERRELL: My principal argument, our principal position, is that raising it, in any event, regardless of the disposition on the 440, could not exhaust this claim, because that is not the highest state court to which defendant had the opportunity to present this claim.

THE COURT: You are relying on his failure to go up from the 440 denial?

MS. FERRELL: No, your Honor. The 440 came after his appeal to the New York Court of Appeals. In his appeal to the highest state court, he could have included this claim. He did not. He, therefore, abandoned any opportunity to present this claim of statutory construction and interpretation and constitutionality to the highest New York State Court.

THE COURT: Wait. That happens a lot, in the sense that ineffective assistance of trial counsel is not raised on direct appeal. Then, habeas petitioners will frequently bring a 440, alleging ineffective assistance of trial counsel, and exhaust it that way. And if it's exhausted in that fashion, then we can deal with it on the merits in a habeas review.

MS. FERRELL: I agree that habeas petitioners frequently pursue ineffective assistance of trial counsel claims by a collateral attack on the motion under 440.

THE COURT: Collateral attack on the conviction.

MS. FERRELL: Yes, I'm sorry. Those claims have to be based on matters not part of the record on appeal. They could not otherwise have been raised on direct appeal.

THE COURT: You mean the 440 Court could deny it on procedural grounds if it could have been brought on direct appeal but wasn't ?

MS. FERRELL: I agree, yes, absolutely.
THE COURT: That's not what happened here.

MS. FERRELL: That's not my principal argument here.

My position is, although he did not raise it on direct appeal to the Appellate Division, when leave to appeal was granted by a Judge of the New York Court of Appeals, that opened the door to any on-the-record claim of error. The defendant chose not to include this on the record, of ineffective assistance of trial counsel, in his brief to the New York Court of Appeals, even though it is grounded upon the same underlying claim that he pursued to the New York Court of Appeals. His ineffective assistance of trial counsel claim is based on the failure to object on constitutional grounds to the charge.

THE COURT: I understand.

MS. FERRELL: On appeal to the Court of Appeals, he raised the alleged unconstitutionality of the charge.

He had the opportunity to raise the ineffective assistance of counsel claim to the highest state court. He did not. After the fact, he went back and tried to raise it in a 440. It was procedurally barred, for two reasons. It's on the record and, as the motion court determined, the Court of Appeals had necessarily contemplated whether the charge in the statute was unconstitutional in addressing whether the charge was confusing. It would not make sense for the Court of Appeals to have sat back and said, The charge is not unconstitutional, and it's not confusing, and we're going to ignore whether it's unconstitutional or not.

He abandoned this claim.

THE COURT: No. He brought it in the 440 court, and instead - - I understand your argument all the way up to the way the 440 Court decided it. If the 440 Court said, this as in the record, you could have raised it in the Court of Appeals on direct appeal, you failed to do so, you are barred procedurally, then I see clearly - - I'm not suggesting that you've lost this argument, but I'm struggling with it.

MS. FERRELL: No.

THE COURT: Let me finish the thought. I see clearly, then, you have an adequate and independent state ground. But the 440 Court didn't say that. It said, in essence, as I read this decision of February 25 of 2002, You got this decided on direct appeal. A necessary implication in the Court of Appeals decision, given the argument that was made, given the cases that were relied upon, is that they rejected this argument, and then it goes ahead and addresses the merits, anyway. So, I'm

not sure the adequate and --you are relying on that Appellate decision -- sorry -- that 440 Court decision was your independent and adequate state ground.

MS. FERRELL: My argument was in anticipation of the fact that this would obviously occur to you.

My position is, it goes back to the fact that to exhaust a claim in state court, the petitioner must raise it to the highest available state court.

THE COURT: Let me change the facts --

MS. FERRELL: And he didn't.

THE COURT: -- and put in clear relief my concern with your argument. Suppose the 440 Court, upon receipt of a collateral attack on the conviction based on ineffective assistance of trial counsel, just said, flat out, Let's have a hearing , and decided it on the merits and denied it, and then leave to appeal was denied. Would that have exhausted the claim?

MS. FERRELL: I'm going to stick to my guns here and say that would be my fallback argument.

THE COURT: What fallback argument? That wouldn't have exhausted the claim?

MS. FERRELL: My argument is, he didn't exhaust it, because he didn't raise it in the Court of Appeals. I'm going to stick with that.

But to respond to your concerns --

THE COURT: But then, you would have - - before you walk away from that -- a claimed adequate and independent state ground that no court in the New York State court system actually relied upon. It's one thing to have it available, but it's another thing to meet what would be your burden, which is that the state courts actually relied on that.

MS. FERRELL: My understanding is, I only have to satisfy the burden of showing that if, in fact, that he had raised it to the highest available court. He didn't. He abandoned this claim. He abandoned his opportunity to do it. Then, in anticipation of making a petition in this court of in any other part in the Eastern District, he tried to exhaust it in a 440. It was a back-door attempt to exhaust a federal claim when he had failed exhaust it in the New York Court of Appeals.

THE COURT: Happens all the time. And if the state court relies on procedural default, then we go down the cause-and prejudice route.

If they don't, and resolve it on the merits, there's no procedural bar. There needs to be a reliance on the procedural--

MS. FERRELL: Relied on the procedural bar under 440.30, failing to state a claim under 440.10, upon which the statutory vests in the trial court to grant a 440 motion to vacate.

THE COURT: I understand your argument.

MS. FERRELL: Short of resting on my papers, for the rest of it, the state courts -- the underlying claim of constitutionality of the charge is, in fact, the claim of confusion, and that claim has been fully addressed and resolved in the state courts.

THE COURT: This is a very interesting issue. I don't believe it's a default issue. It doesn't affect the absence of merit in the underlying claim.

One other question on the procedural default ground. In order to exhaust, if it was properly presented to the 440 court, all that needs to be done is to seek leave to appeal to the Appellate Division and have it denied; correct?

MS. FERRELL: Yes.

THE COURT: You don't have leave to appeal 440. You can't.

MS. FERRELL: You are not permitted to.

THE COURT: Anything further?

MR. FALLICK: I would like to argue again about the substantive issue. You seemed to have made your mind up.

THE COURT: The case has obviously got a long history. There's been vigorous -- to my mind, effective, in the constitutional sense -- advocacy for Mr. O'Hara. Obviously, the results didn't turn out the way he wanted them to, but it's plainly not because of ineffective assistance of counsel. There's a parade of able lawyers in this case in its various forms in the state system, and another is before me now on the federal habeas petition.

I don't intend to write on it. I'm going to give you my decision orally.

Mr. O'Hara is an attorney. He's charged, in 1996, with offering a false instrument for filing in the first degree, with false voter registration and with five counts of illegal voting.

All of the charges arise out of allegations that, in the period from approximately 1992 to 1994, Mr. O'Hara falsely represented that he lived at 553 47th Street in Brooklyn, in order to vote in the election, state assembly, and city council districts in which that address was located, when, in fact, he lived on 61st Street, at 569 61st Street in Brooklyn.

There's a long procedural history. The case was tried three times in state court. The first time, Mr. O'Hara was convicted on all charges. Those convictions were reversed, based on a jury-charge issue that's unrelated to the issue in this petition.

The second trial resulted in a hung jury and the declaration of a mistrial.

He was convicted again on all counts in this third trial. A significant issue in that, as well as in the first two trials, was the charge on the voting-residency requirement. The charge in the third trial, which is not substantially if at all different from the charges in the first two, read as follows: "According to the law, a residence is that place where a person maintains a fixed, permanent and principal home, and to which he, wherever temporarily located, always intends to return. Additionally, a candidate who has two residences may choose one to which he has the legitimate, significant and continuing attachment, as his residence for purpose of the election law. It is for the candidate to decide which address is to be his voting and campaigning address. However, the address chosen by the defendant as his residence must comport with the definition of 'residence' as I have previously given to you."

The charge is an amalgam of New York Election Law, Section 1104.22, which provides that a voter may designate as his voting residence that place where a person maintains the fixed, permanent and principal home, and to which he, wherever temporarily located, always intends to return, and of

Ferguson vs. McNabb, a Court of Appeals decision from 1983, which held that a person having two residences that individually might qualify as a voting residence may choose one to which she has a legitimate, significant and continuing attachment as her residence for purpose of the election law.

The objection at the third trial, like the objections at the first two, addressed a claim of confusion. It was concededly not a federal constitutional-based challenge to this charge. It was a challenge articulated as well here today as it was in state court, but was not based on the equal-protection clause or on any other federal constitutional provision. It was rejected by the Appellate Division at 713 NY Supp. 2d 119, 2000. The case was fully briefed and argued and decided by the Court of Appeals. The decision is at 96 New York 2d 378, 2001. It found the charge not to be confusing; indeed, to be correct.

There's no claim that the two claims in the habeas petition before me were raised in that direct review process; that is, ineffective assistance of trial counsel and ineffective assistance of appellate counsel. The ineffective assistance of appellate counsel claim was exhausted by a coram nobis petition that was denied. Specifically, the claim that appellate counsel was ineffective in failing to argue that trial counsel was ineffective, in that trial counsel failed to challenge the charge I've quoted on constitutional grounds, and that appellate counsel was also ineffective for failing to make that constitutional claim on direct appeal.

There were two 440 petition, the second of which, filed in November of 2001, raised ineffective assistance of trial counsel failure to make the constitutional challenge. That gave rise to this decision in February of 2000, which has -- it's part of the record, although I don't think it's published -- a section in the decision, a subtitle, called Procedural Bars. And it purports to reject, or it does reject, the ineffective assistance of

trial counsel claim on procedural grounds. It cites 440.10(2)(a), which cites criminal procedure law of New York, which, according to the decision, mandates that a Court deny a post-conviction motion if the ground or issue has previously been determined on the merits upon appeal and there's been no retroactive change in the controlling law.

It also cites 440.30(4)(a), which permits a Court to deny a motion to vacate judgments if the moving papers fail to allege any legal basis for the motion.

The discussion that follows in the 440 court's decision, dated February 25, 2000, includes the following: "Since the Court of Appeals has ruled that the instant charge was valid under the laws of New York, and the cases cited by the defendant establish that the New York law complies with constitutional dictates" -- I'm omitting a cite -- "the Court's charge must have complied with constitutional dictates. Thus, there was no legal defense -- legal basis for defense counsel to object to the Court's charge as a violation of defendant's constitutional rights."

So, it's not crystal clear what the 440 court was doing, but it appears to be relying on the fact that this constitutional claim was, sub silencio, denied on direct appeal, and, therefore, there's no legal basis. To my mind, that doesn't amount to an adequate and independent state procedural ground. I realize it's called a procedural bar, but the bar seems to be more along the lines of, this was already decided on the merits; therefore, I need not address it, although then, the Court goes on to address on the merits, anyway, as opposed to this was forefeited and defaulted procedurally. For that reason, I'm erring on the side of concluding it's fully exhausted, even though Mr. O'Hara came close to throwing in the towel on that issue, and I'll jut deal with it on the merits.

The standard for determining whether a petitioner

received ineffective assistance of counsel -- I'm talking bout the trial counsel claim now -- is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. There are two elements to the claim. One is that counsel's performance is shown to have been deficient; that is, falling below an objective standard of reasonableness measured against prevailing professional norms. Second, the petitioner needs to show that there is a reasonable probability that, but for the unprofessional errors of trial counsel, the result of the proceeding would have been different.

In assessing the reasonableness of counsel's performance, judicial scrutiny of counsel's performance must be deferential. The Court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the petitioner has to overcome a presumption that, under the circumstances, the challenged conduct of trial counsel might be considered sound trial strategy. All of this comes from Strickland vs. Washington, 466 U.S. 668, 1984.

The federal constitutional claim here has never been, to my mind, satisfactorily articulated, at least in the sense that it hasn't been articulated with an eye towards this particular case. And I don't fault counsel for this. I think it's a very difficult petition to have brought, given the deferential approach to state court decision-making that's required by the AEDPA statute. The right hasn't been articulated in the context in which this case was tried.

And for me, a very important piece of the record is what the New York Court of Appeals had to say, regarding this challenge to this allegedly confusing charge, in affirming. I'm reading from page 385 in its decision at 96 New York 2d: "Here, the jury was not asked, as defendant claims, to

determine whether, as between two residences, defendant picked the more appropriate one. The sole issue here was whether defendant genuinely took up residence at 553 47th Street for voting purposes."

If I were writing this, there would be an ellipsis here. I'm picking up the quote one sentence later: "The jury was not instructed to convict defendant if it found that he actually maintained two residences." Again, skipping one sentence, continuing with the quote: "It instructed the jury" -- referring to the charge -- "on how to determine whether 553 47th Street could be considered defendant's residence for voting purposes, and it informed the jury that if the proof established that defendant had two residences, he could pick one, as long as s the residence he picked, 553 47th Street, was indeed a residence of his and not a sham."

That's how the case was tried. And because that's how the case was tried, it's plain to me that trial counsel cannot be faulted for failing to make an equal-protection claim. There's no federal constitutional protection, either clearly established or clearly inferrable from the cases on which petitioner relies, against being obligated to select as your voting residence a place that is actually your residence. Truth be told, I think respondent has a very powerful argument, that New York law is favorable to persons such as John O'Hara, in that it gives them an option, provided the residence chosen is, indeed, a residence, to select from two or more qualifying residences, the one that will be his voting residence.

Let me point this out, and this really relates to the state-law claim. The objected-to portion of this charge is the "However" clause: "However, the address chosen by the defendant as his residence must comport with the definition of 'residence' as I've previously given you."

Well, the objection is that that links back to the original

definition of "residence." But that's inescapable. The jury only applies that instruction when a candidate has two residences. That's from the part of the charge to which there's no objection. The residence is previously defined as a place where a person maintains a fixed, permanent and principal home, and to which he, wherever temporarily located, always intends to return. I don't think the objection to this charge inheres in this "however" clause, at the end of it. I think the objection, at bottom, boils down to the requirement that whichever of the residences is chosen, it has to actually be a permanent and principal home and a fixed home. That was not the case here. The evidence in the case, which I reviewed exhaustively, I found extremely powerful.

For these reasons, the first prong of the Strickland test is not met. It did not fall below an objective standard of reasonableness to refrain from making an equal-protection challenge or any other constitutional challenge. Because I find the evidence to have been extremely powerful, bordering on the overwhelming, the second prong is not met as well. That is, there's no reasonable probability that but for counsel's alleged unprofessional error, the result would have been different.

The ineffective assistance of appellate counsel claim is an even more difficult road for the petitioner. Appellate advocacy here at every stage was thorough. The appellate arguments made after the third trial, and the convictions obtained at that trial, are set forth at pages 8 through 10 of the affidavit in opposition, Ms. Ferrell's affidavit in opposition, to the petition. A 172 page appendix, accompanied a sixty-eight page brief, with a number of challenges. The supreme court has explicitly recognized that experienced advocates, since time beyond memory, have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue, if possible, and, at most, on a few key issues.

Even if this were a nonfrivolous claim, the constitutional claim, and even were it affirmatively requested by O'Hara to be included in the direct appeal, it would not have been ineffective assistance of counsel to refrain from making it. It was not requested. It has no merit. Therefore, it follows that it was not ineffective assistance of appellate counsel to refrain from making it.

On the merits, I would have rejected these claims de novo. Given the deferential standard that attends on habeas review -- that is, I can only set aside, on habeas review, a state court judgment of conviction if the decision was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States -- obviously, since I would reject it de novo, given that deferential standard, I certainly couldn't find that the state court's rejection of these claims was unreasonable . So, I'm denying the petition on the merits. I don't think there's a substantial showing of a denial of a federal constitutional right. So, a certificate of appealability shall not issue.

Anything else I need to address?

MS. FERRELL: No. Thank you.

MR. FALLICK: No, your Honor.

THE COURT: Thank you.

MS. FERRELL: Thank you, your Honor.